1979

Lucille Jesse Moffat Thornock, Et Al. v. Lois S. Cook : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LUCILLE JESSE MOFFAT THORNOCK, et al.,	
Plaintiffs and Respondents,	
vs.	CASE NO. 16231
LOIS S. COOK,	
Defendant and Appellant	

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the District Court of the First Judicial District of the State of Utah, in and for the County of Rich.

The Honorable VeNoy Christofferson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

LUCILLE JESSE MOFFAT THORNOCK, et al,	:	
Plaintiffs and Respondents,	:	CASE NO. 16231
vs.	:	
LOIS S. COOK,	:	
Defendant and Appellant	:	

STATEMENT OF THE CASE

This is an action to quiet title to mineral rights in certain real property located in Rich County, Utah.

DISPOSITION IN LOWER COURT

The District Court of Rich County granted a Default Certificate against all defendants except Appellant LOIS S. COOK, who alone appeared and answered; granted Summary Judgment for Plaintiffs upon Plaintiffs' Motion; and issued

a Decree of Quiet Title confirming title to the disputed mineral rights in plaintiffs. From this Summary Judgment and Decree, Defendant LOIS S. COOK appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Summary Judgment below, and a remand to the District Court for a trial by jury on the merits.

STATEMENT OF FACTS

Appellant refers to and incorporates herein by reference the Statement set forth in Appellant's Brief on this Appeal.

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ARGUMENT

POINT I

THE RECORD INDICATES A DEFECT IN THORNOCK'S TITLE TO THE REAL PROPERTY IN DISPUTE, AND SUCH DEFECT MUST BE RESOLVED BEFORE THE RIGHTS OF THE PARTIES HEREIN CAN BE DETERMINED.

A. COOK HAS AN INTEREST IN THE REAL PROPERTY IN DISPUTE SUFFICIENT TO ENABLE HER TO RAISE THE ISSUE OF THE ALLEGED DEFECT.

B. SHOULD THE COURT FIND A DEFECT IN THORNOCK'S TITLE TO THE REAL PROPERTY IN DISPUTE, COOK CAN ASSERT A CLAIM TO THE PROPERTY BY REASON OF ADVERSE POSSESSION.

C. SHOULD THE COURT FIND COOK'S CLAIM TO THE PROPERTY BY REASON OF ADVERSE POSSESSION VALID, THORNOCK HAS NO RIGHT TO THE MINERALS.

Respondents in their Brief on Appeal (RB) for the first time challenge the "standing" of COOK to raise the defect in THORNOCK'S title. (RB 15) They set forth, with authoritative support, the proposition that a defendant in an action to quiet title cannot defeat plaintiff's

title by showing a superior title in some third person through whom the defendant makes no claim. Unfortunately such proposition is irrelevant to the case. Appellant COOK is making no attempt to defeat defendant THORNOCK's title by showing a superior title in some third person. COOK is merely raising the issue of the defect in THORNOCK's title in order to demonstrate that COOK herself, as a remote grantee of THORNOCK, does not have title to the property by deed, but rather has title to the property by adverse possession.

Respondents correctly cite, but incorrectly apply, the general rule stated at 65 Am. Jur. 2d "Quieting Title §45, in part:

> In this regard, it has been said that the court determines the rights of the parties under the pleadings and evidence, grants proper relief, and determines the better title as between the parties to the proceeding, though a title superior to the rights of either party may be held by a stranger to the suit.
>
> (emphasis added)

COOK is only concerned with proving that she has a better title to the property than THORNOCK, not with asserting that any stranger to the suit has a superior title. The defect in Thornock's title is only being raised to prove the superiority of COOK's title.

Further, Respondents claim that by asserting that THORNOCK's title is defective, COOK defeats any claim she has to the title through the chain of title and so makes herself a stranger to the title with no "standing" to assert the defect. A person has standing to raise a claim or defense whenever his or her rights or interests, legal or equitable, are affected or threatened. A person must have

> some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy, sometimes spoken of as standing.
>
> 59 Am. Jur. 2d "Parties" §26 at 374.

As discussed below, this issue is not a frivolous immaterial matter to COOK. The decision as to the defect in THORNOCK's title will substantially affect her legal right and interest in the property. Clearly, the defect in THORNOCK's title is an issue which COOK may and must raise.

As argued at Point I.B.of Appellant's Brief (AB), should the court find a defect in THORNOCK's title to the real property in dispute, COOK can assert a claim to the property by reason of adverse possession since she and her late husband took possession of the property in 1952 and occupied and used it for the statutory period. Respondents argue that there is no provision under Utah law for assertion of adverse possession where the claimant has entered into

possession without claim of title, and it is argued, since COOK asserts she does not have title as a remote grantee of THORNOCK, she entered into possession without claim of title and therefore cannot adversely possess.

Respondents fall into the trap of failing to distinguish between "claim of title" and "color of title". This distinction is at 3 Am. Jur. 2d "Adverse Possession" §96 at 177.

> Terms such as 'claim of right', "claim of ownership'....mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right.....
>
> 'Color of title', on the other hand, is that which gives the semblance or appearance of title, but is not title in fact--that which, on its face, professes to pass title, but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance.
>
> These differences between 'color' and 'claim' of title becomes important in view of the fact that in order that a possession may ripen into a title, occupancy under a 'claim' of title or right is indispensable, while 'color' of title is not necessary, unless required by statute.

As respondents note (RB 15), Utah law only requires "claim of title", not "color of title". Utah Code Ann. (Repl. Vol. 9 A 1977) §78-12-8 and §78-12-10.

Claim of title can be demonstrated by conduct. The Virginia Supreme Court in Walton v. Rosson, 216 Va. 732, 222 S.E. 2d 553 (1976) set forth the criteria which the majority of jurisdictions hold sufficient to establish claim of title:

> Claim of title, as opposed to color of title, is a mere assertion of ownership or right, without paper title. The possessor intends to appropriate and use the land as his own, to the exclusion of all others irrespective of any semblance of title or legal right. . .A claim of right need not be expressed. It is sufficient that the acts of the party in possession indicate a claim of ownership. The actual occupation, use and improvement of the premises, without payment of rent, recognition of another's title or disavowal of one's own title, raises a presumption that the possessor entered and is holding as absolute owner.
>
> Id. at 735.

COOK and her deceased husband entered upon the subject property in 1952 with the intention of using it as their own land to the exclusion of all others. They used and occupied it from that time forward paying no rent to anyone else, recognizing no one else's title to it, and claiming it as their own. Their conduct certainly manifested a claim of title sufficient for them to claim title by reason of adverse possession.

It is interesting to note that, even if Utah law did require color of title as well as claim of title, COOK has color of title on two grounds. First, she has her deed, which although inoperable to pass title because of the defect in THORNOCK's deed, is operable to give her color of title. "Color of title is a writing upon its face purporting to pass title, but in fact does not". Peterson v. Weber County, 99 Utah 281, 103 P. 2d 6[illegible] (1940). Secondly, she has color of title by operation of law. As stated at Utah Code (Repl. Vol. 6 A 1953). §57-6-

> . . .any person has color of title who has occupied a tract of real estate by himself or by those under whom he claims, **for** the term of 5 years. . . . . .

Should the court find COOK's claim to the property by reason of adverse possession valid, THORNOCK has no right to the minerals. This conclusion logically follows from well-established rules of real property. First, an adverse possessor has absolute title to both surface and sub-surface rights. Second, where a quitclaim deed is involved after-acquired title does not vest in the grantee. Respondents challenge this on two separate bases. First, it is argued that once COOK acquired title by reason of adverse possession, the doctrine of after-acquired title mandated that title passed immediately to Johnson, her

immediate grantor, and then from Johnson to THORNOCK, by reason of the Johnson-Cook and Thornock-Johnson deeds. This argument is based on the assertion that a "reservation" in a deed is a conveyance, so that in the Johnson-Cook deed, COOK was actually the grantor to THORNOCK of the mineral rights. This linguistic twist, acting to transform the grantees into grantors, would enable application of the after-acquired property principle in reverse. In the case cited by Respondents (RB 20), Burton v. United States, 29 Utah 226, 507 P. 2d 710 (1973), this court is quoted as stating:

> The reservation creates a new right issuing out of the property granted, which did not exist as an independent right before the grant.
>
> Id. at p. 712 (emphasis added).

It is a difficult jump from the phrase "new right issuing out of the property granted" to reach the conclusion that grantee becomes grantor for purposes of the reservation. Furthermore, even if it were conceded that the reservation is a granting back of property granted, it would seem only logical that it would be necessary that property be validly conveyed initially. As stated at 23 Am. Jur. 2d "Deeds" §262 at p. 297-8:

> . . .the terms 'reservation' and 'exception' are quite commonly used as interchangeable terms. . .The factor common to both an exception and reservation is that each subtracts or deducts from the thing granted, narrowing and limiting what would otherwise pass by the general words of grant. Accordingly, either a reservation or an exception in a deed, to be effective, must be of some right or interest owned by the grantor in the land at the time the deed was made. Also, regardless of the nomenclature used by the grantor, the meaning intended must be determined by reference to the subject matter and the surrounding circumstances.
>
> (emphasis added).

In the case at bar, appellants are alleging that THORNOCK had a defective title and, therefore, had no title to pass to Johnson, who in turn had no title to pass to COOK. Arguably, the grantor for each deed then had no right or interest to convey at the time the deed was made, and therefore the reservation was ineffective.

Phillips v. Johnson, 202 Okla. 645, 217 P. 2d 520 (1950) involved a situation similar to the one in the instant case. Plaintiff in Phillips conveyed real property to Grantee I with a reservation of mineral rights in Plaintiff. Grantee I conveyed to Grantee II with the same reservation stated in their conveyance. Grantee II them conveyed to Plaintiff with the same reservation because he was under the misunderstanding that the clause was necessary to preserve the continuity

of reservation in himself, and Grantee II so understood the situation. After Plaintiff became owner of the property, Grantee II died, and his heirs did not even try to establish that Grantee II could reserve the mineral rights if he did not originally have them.

> Defendant apparently concedes that a reservation in a deed, to be effective, must reserve some right or interest owned or possessed by grantor in the land at the time the deed was made, since this rule is well established.
>
> Id. at p. 646.

The court examined the circumstances and the parties' intentions and determined that the mineral rights were originally reserved in Plaintiff's name and, therefore, since Grantee II never had them, she could not reserve them.

Likewise, since neither Johnson nor THORNOCK ever owned the mineral rights by fault of the defects in the chain of title, they could not reserve them and so the after-acquired property rule did not act to convey the rights to them once they were acquired by COOK by virtue of adverse possession.

Secondly, respondents argue that the established principle that after-acquired title does not vest in the grantee where a quitclaim deed is involved should not be

applied to the instant situation. Appellants agree that there is an exception which is applicable in certain situations. As stated at 26 C.J.S. "Deeds" §118 at p. 94:

> An after acquired title may pass, however, under special circumstances, as where a person conveys by quitclaim deed and covenants against a particular title which he afterwards acquires. . . . . .
>
> (emphasis added).

The cases where the exception to the established principle stated above is applied, involve situations where the language of the quitclaim deed contains a convenant quitclaiming all right and title in possession and expectancy or contains covenants of further assurances. The case used by respondents as authority, McAdams v. Bailey, 169 Ind. 618, 82 N.E. 1057 (1907) itself contained a quitclaim deed with such a covenant:

> . . . .the interest conveyed by said Zachariah T. Lincoln is the equal, undivided one-third part of two-thirds of the same, and any other interest which might accrue to said Zachariah T. Lincoln after the death of said Elizabeth, his mother. . . . .
>
> Id.at p. 520 (emphasis added).

On the basis of the language "and any other interest which might accrue", the court held title in after-acquired property passed to the grantee of the quitclaim deed when acquired by grantor.

In the case at bar, the quitclaim deed from COOK to THORNOCK contained no such covenant. Therefore, in accord with Utah Code Ann. (Repl. Vol. 6 A 1953) §57-1-13, the effect of the quitclaim deed was simply to convey COOK's interest in the property at the date of the deed, and since COOK's title by adverse possession had not yet ripened, COOK has no interest to convey.

Therefore, if the court finds that COOK's claim of adverse possession is valid, THORNOCK has no right to the minerals under any theory.

POINT 2

THE RECORD SHOWS THAT QUESTIONS OF FACT AS TO THE VALIDITY OF THE QUITCLAIM DEED EXIST WHICH WARRANT A TRIAL ON THE MERITS.

Respondents contend that under Rule 56(e), Utah Rules of Civil Procedure, the assertions of COOK in her Second Amended Answer and Counterclaim may not be considered by the Court since they are legal conclusions. In the subject pleading, COOK denies that she ever executed the Quitclaim Deed - this is a statement of fact based on personal knowledge. It is not a conclusion, not an opinion and not hearsay. Additionally, in the subject pleading the issue is raised regarding the insertion by hand of the land description on page 1 of the quitclaim deed. COOK denies knowledge of the insertion or the surrounding circumstances, and in fact, she did not initial the insertion. The fact of the insertion as well as the fact of COOK's lack of knowledge and consent are not legal conclusions, not opinion and not hearsay. They raise factual issues affecting the validity of the quitclaim deed.

Even if the Court did not consider the allegations in the Second Amended Answer and Counterclaim, the balance of the record shows sufficient issues of fact regarding the validity of the quitclaim deed to warrant a trial on the merits. This is amply argued in Appellant's Brief at Point

To briefly recapitulate, the deed on its face raises questions: namely, the above-mentioned after-inserted land description, undated and uninitialled by COOK; page 2, the signature page, contains only signatures with no reference to page 1; the qualitative differences in stationery between pages 1 and 2. Certainly these are questions which cannot be resolved absent additional evidence and the testimony of expert witnesses. Further, COOK's deposition raises triable issues of fact. In it, she states repeatedly that she has no recollection of having executed a quitclaim deed. She only recalls that she signed a "paper", one executed solely because she and her husband were continually "hounded" by THORNOCK. Obviously, there are serious doubts as to the validity of the quitclaim deed.

As this court stated in Durham v. Margetts, 571 P. 2 1332 (Utah 1977),:

> The summary judgment procedure has the desirable and salutory purpose of eliminating the time, trouble and expense of a trial when there are no issues of fact in dispute and the controversy can be resolved as a matter of law. Nevertheless, that should not be done on conjecture, but only when the matter is clear; and in case of doubt, the doubt should be resolved in allowing the challenging party the opportunity of at least attempting to prove his right to recover. For

> that reason, the "submissions" [pleadings, depositions, admissions and affidavits] should be looked at in the light most favorable to her position and unless the court is able to conclude that there is no dispute on material facts, which if resolved in her favor would entitle her to recover, the court should not summarily reject her claim and render judgment against her as a matter of law. Upon review we apply the same standard as that applied by the trial court.
>
> Id. at p. 1334 (emphasis added).

Looked at in the light most favorable to COOK, the submissions manifest questions of fact regarding the validity of the quitclaim deed which could be resolved in COOK's favor, and which might thereby affect the judgment. Therefore, it would seem that summary judgment should not have been given against her as a matter of law.

CONCLUSION

There are substantial questions of fact to be resolved regarding the validity of the quitclaim deed. If it is determined to be invalid, the mineral rights in the subject property were not conveyed to THORNOCK.

Even if the quitclaim deed is held to be valid, since COOK has title to the property by adverse possession, a title which had not ripened at the time the quitclaim deed was executed, the mineral rights were not conveyed to THORNOCK by the quitclaim deed. The determination of the validity of COOK's claim to title by virtue of adverse possession necessitates the resolution of factual questions regarding the defect in THORNOCK's title.

The existence of questions of fact as to the validity of the quitclaim deed and the validity of THORNOCK's title, warrant a trial on the merits.

For these reasons, appellant prays this honorable court to set aside the summary judgment below, together with the decree of quiet title, and to remand the entire matter for a trial on the merits in the District Court.

DATED September 28, 1979.

Respectfully submitted,

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